

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA**

ANTONIO DAVIS,

Plaintiff,

vs.

RICHLAND COUNTY; SHERIFF LEON
LOTT; DEP. SARA GIRON; ADRIAN
THOMPSON; and DEP. ADAM
CORNWELL,

Defendants.

No. 4:12-cv-3429-RMG

ORDER

This matter comes before the Court on the Report and Recommendation (R & R) of the Magistrate Judge (Dkt. No. 88), recommending that this action be dismissed for failure to prosecute. For the reasons stated below, the Court **DECLINES** to adopt the R & R, and this matter is **RECOMMITTED** to the Magistrate Judge for further proceedings.

I. Legal Standard

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). This Court may also “receive further evidence or recommit the matter to the magistrate judge with instructions.” *Id.*; *accord* Fed. R. Civ. P. 72. This Court is charged with making a de novo determination of those portions of the R & R or specified proposed findings or

recommendations to which objection is made. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting 28 U.S.C. § 636(b)(1)); *accord* Fed. R. Civ. P. 72(b).

II. Discussion

Plaintiff brought this Section 1983 action *pro se*. Defendants filed a motion for summary judgment (Dkt. No. 76), and the Magistrate Judge entered a *Roseboro* Order, advising Plaintiff that a failure to respond to Defendants' motion could result in dismissal of his Complaint. (Dkt. No. 77). Upon Plaintiff's request, the Magistrate Judge extended the deadline to respond to Defendants' motion to January 30, 2014. (Dkt. Nos. 80, 81). Plaintiff did not file a response, and the Magistrate Judge issued the R & R at issue.

Plaintiff filed an objection to the R & R, stating that he mailed his response to the Court on January 30, 2014. (Dkt. No. 92). He states that he could not mail or overnight the response on January 28 or 29, 2014, because all government offices were closed due to weather. (*Id.*) Included with his objections, Plaintiff provides a copy of his opposition, a receipt from the post office dated January 30, 2014, and a postal tracking document. (Dkt. No. 92-1 at 1-3). While postal tracking document does not provide a specific address, Plaintiff will be given the benefit of the doubt. He at least thought that he had sent his opposition to the summary judgment motion on January 30, 2014. While a filing mailed on the due date would have still been received late, the Court does not believe that this delay warrants dismissal, given that the Post Office was closed due to weather on January 28 and 29, 2014.

Therefore, the Court **DECLINES** to adopt the R & R. The Clerk is directed to docket Plaintiff's Memorandum in Opposition to Defendants' Summary Judgment and attachments

(Dkt. No. 92-1 at 6-34) as a Response in Opposition to Dkt. No. 76, and this matter is
RECOMMITTED to the Magistrate Judge.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'R. M. Gergel', written over a horizontal line.

Richard Mark Gergel
United States District Judge

March 17, 2014
Charleston, South Carolina